

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO. OF 2006

Office Notes, Office Court's or Judge's orders
Memoranda of Coram
appearances, Court's orders
or directions and
Registrar's orders

Mr.A.M.Saraogi for Applicant
Mr.Subhash Dhandge for Res.no.1 & 2
Ms.M.H.Mhatre APP for State

Coram : R.S.Mohite, J

Date : 28.11.2007

PC

1. Heard both sides.

2. Leave has been granted by me by a separate order passed in Criminal Application No.2866 of 2006. By consent, appeal is taken up for final disposal as the point involved is very short. From the impugned judgment and order, it appears that in a case under section 138 of the Negotiable Instruments Act, an affidavit in lieu of examination-in-chief came to be filed by the complainant and the same was accepted by the Magistrate on record. Later on, the complaint has

been dismissed on the ground that the affidavit which was accepted by the Court was not properly sworn. Accused have been acquitted on the ground that the evidence of the complainant could not be taken into account because the affidavit in lieu of the examination-in-chief was not affirmed. In my view, this has resulted in miscarriage of justice. The proper course that the Magistrate ought to have followed was to allow the complainant to affirm the affidavit in lieu of examination-in-chief and to allow the accused to cross-examine the complainant afresh if he so desired. In this view of the matter, appeal is allowed. The impugned judgment and order dated 22nd June, 2006 passed by the Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai in C.C.No.2268/05 is quashed and set aside with a direction to the Magistrate to get the affidavit in lieu of examination-in-chief of the complainant affirmed and thereafter permit the accused to cross-examine the complainant if they so desired and to re-decide the matters on record. It is made clear that no further evidence

will be allowed to be adduced and other evidence which is on record will be analysed on merits when the judgment is delivered on merits.

Appeal is disposed of accordingly.

(R.S.Mohite, J)